

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Brookhaven Servicing Corp. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation Franchise :
Tax under Article 9A of the Tax Law for the Years :
1978 & 1979. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 26th day of July, 1984, he served the within notice of Decision by certified mail upon Brookhaven Servicing Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brookhaven Servicing Corp.
c/o New York Guardian Mortgage Corp.
320 Fulton Ave.
Hempstead, NY 11550

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
26th day of July, 1984.

David Parchuck

[Signature]

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Brookhaven Servicing Corp. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law :
for the Years 1978 & 1979. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 26th day of July, 1984, he served the within notice of Decision by certified mail upon Nicholas J. Creme, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas J. Creme
Milgrim, Thomajan, Jacobs & Lee Prof. Corp.
405 Lexington Ave.
New York, NY 10174

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
26th day of July, 1984.

David Parchuck

William A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 26, 1984

Brookhaven Servicing Corp.
c/o New York Guardian Mortgage Corp.
320 Fulton Ave.
Hempstead, NY 11550

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Nicholas J. Creme
Milgrim, Thomajan, Jacobs & Lee Prof. Corp.
405 Lexington Ave.
New York, NY 10174
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BROOKHAVEN SERVICING CORP.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years 1978	:	
and 1979.	:	

Petitioner, Brookhaven Servicing Corp., c/o New York Guardian Mortgagee Corp., 320 Fulton Ave., Hempstead, New York 11550, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1978 and 1979 (File No. 33683).

Petitioner, by its duly authorized representatives Milgram, Thomajan, Jacobs & Lee, P.C. (Nicholas J. Creme, Esq., of counsel), has waived a hearing and submits its case for decision based upon the entire file, including a stipulation of facts received on March 23, 1984. After due consideration of the file the Commission renders the following decision.

ISSUE

Whether petitioner may reduce its New York taxable income for years in which it was subject to tax under Article 9-A of the Tax Law, by net operating loss carryforwards from prior years during which it was subject to tax under Article 32 of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Brookhaven Servicing Corp., and the Audit Division have stipulated to the relevant facts in this matter, as follows:

- (1) Brookhaven Servicing Corp. ("Brookhaven"), a New York corporation, was organized on July 27, 1970. Until its acquisition by the New York Guardian Mortgagee

Corp. ("Guardian"), Brookhaven was a wholly-owned subsidiary of Community National Bank and Trust Co. of New York ("Community"), a national banking association with its principal place of business at 3155 Amboy Road, Staten Island, New York. While Brookhaven was owned by Community it filed its New York State tax returns under Article 32 of the New York Tax Laws.

- (2) Brookhaven engaged in the mortgage servicing business and conducted its business wholly within New York State while it was a Community subsidiary.
- (3) Guardian, a New York corporation, was incorporated on September 29, 1961. Prior to December 31, 1979, Guardian was a wholly-owned subsidiary of Barshap Associates, Inc. ("Barshap").
- (4) Brookhaven incurred net operating losses in carrying on its New York mortgage servicing business prior to 1978. All losses were New York source losses and all of Brookhaven's income during 1978 and 1979 was New York source income.
- (5) On November 1, 1977, Guardian purchased all the outstanding Brookhaven stock (830 shares of common stock) for an aggregate price of approximately \$1.5 million.
- (6) Brookhaven filed separate Federal and New York State tax returns under Article 9-A for its tax years ended December 31, 1978 and December 31, 1979.
- (7) In computing its Federal and New York taxable income for its tax years ended December 31, 1978 and December 31, 1979, Brookhaven claimed the net operating loss deductions to which it was entitled under §172 of the Internal Revenue Code of 1954, as amended ("Code"). Brookhaven properly reduced its Federal taxable income by its net operating loss carryforward under Code §172. New York would permit Brookhaven to reduce its New York taxable income by its pre-1978 losses if Brookhaven had filed during those years under Article 9-A of the New York Tax Law rather than under Article 32 of the Tax Law.
- (8) On April 17, 1983 the New York State Department of Taxation and Finance issued two Notices of Deficiency to Brookhaven for its tax years ended December 31, 1978 and December 31, 1979 in the amount of \$26,043 and \$25,377 respectively, plus interest, denying the net operating loss deduction on the sole ground that

during the year the losses were sustained, Brookhaven filed under Article 32, rather than under Article 9-A.

- (9) On June 3, 1981, Brookhaven timely filed a Petition with the State Tax Commission Tax Appeals Bureau, contesting the asserted deficiencies.

2. Petitioner asserts the purpose behind allowing net operating loss deductions was to... "allow businesses with fluctuating earnings to achieve an averaging of their income to balance the good years with the lean". Petitioner maintains that language contained in section 208.9(f) of Article 9-A of the Tax Law, providing that the "...[net operating loss] deduction shall not include any net operating loss sustained during any taxable year... in which the taxpayer was not subject to the tax imposed by [Article 9-A]...", should not preclude petitioner from availing itself of net operating loss carryforwards from prior years during which petitioner was subject to tax under Article 32 of the Tax Law rather than Article 9-A. Petitioner maintains such language was intended only to preclude New York source income from being reduced by non-New York source losses carried forward from prior years, but was not intended to prohibit offsetting New York source income by prior incurred New York source losses, notwithstanding the particular article of the Tax Law under which the taxpayer filed in the earlier loss year(s).

CONCLUSIONS OF LAW

A. That for purposes of the franchise tax on business corporations, entire net income is defined as "total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department...". Tax Law, Section 208.9.

B. That section 208.9(f) of Article 9-A of the Tax Law permits a net operating loss deduction from entire net income, as follows:

"A net operating loss deduction shall be allowed which shall be presumably the same as a net operating loss deduction allowed under section one hundred seventy-two of the Internal Revenue Code of nineteen hundred fifty-four... except that... (2) such deduction shall not include any net operating loss sustained during any taxable year beginning prior to January first, nineteen hundred sixty-one, or during any taxable year in which the taxpayer was not subject to the tax imposed by this article, ..." (emphasis added).

C. That regulations of the State Tax Commission pertaining to the above-quoted section provide, in relevant part, as follows:

"(b) The first limitation on the net operating loss deduction for purposes of article 9-A is that no deduction is allowed for a loss sustained during any taxable year beginning prior to January 1, 1961, or sustained during any year in which the corporation sustaining the loss was not subject to tax under article 9-A.

Example 1: A corporation is incorporated in Pennsylvania in January 1972. During the taxable year 1972, it sustains an operating loss of \$10,000. In January 1973, it begins to do business in New York State. For taxable year 1973, it has entire net income of \$10,000. The loss sustained in 1972 shall not be carried forward to taxable year 1973 or to any subsequent taxable year since the corporation was not subject to the New York State franchise tax in 1972." [20 NYCRR 3-8.2(b)].

D. That the net operating losses giving rise to the loss carryforwards sought by petitioner were sustained in years during which petitioner was subject to tax under Article 32 (Franchise Tax on Banking Corporations) rather than under Article 9-A (Franchise Tax on Business Corporation). The clear language of Tax Law section 208.9(f) precludes petitioner, an Article 9-A filer, from utilizing losses sustained during earlier years when it did not file under such article. Had a broader availability of loss utilization been

intended, the statutory language could have been so phrased.¹ Accordingly, an expansion of the statutory language, as urged by petitioner, is not warranted.

Finally, we note that the example contained in the foregoing cited regulation [20 NYCRR 3-8.2(b)] reflects only one of many possible factual situations wherein a taxpayer filing under Article 9-A would be precluded from availing itself of prior period losses because the taxpayer was not, at the time such losses were incurred, subject to tax under Article 9-A. The example does not serve to restrict applicability of the limitation on loss carryforwards contained in Tax Law section 208.9(f) to the single factual situation presented therein.

E. That the petition of Brookhaven Servicing Corp. is hereby denied and the notices of deficiency dated April 17, 1983 are sustained.

DATED: Albany, New York

JUL 26 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

¹ Petitioner argues that the legislative history behind Tax Law section 208.9(f), together with Example "1" contained in 20 NYCRR 3-8.2(b), indicate that the loss deduction limitation was intended only to preclude a taxpayer from offsetting New York source income with prior-incurred non-New York source losses. Had the legislature so intended, the limitation language of the statute could have been worded less restrictively so as to only preclude the use of carryforwards and/or carrybacks in situations involving "losses sustained during any taxable year in which the taxpayer was not subject to franchise taxes imposed by this State".